

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

April 21, 2015

Elisabeth A. Shumaker
Clerk of Court

DAVID WEBB,

Petitioner,

v.

TIMOTHY SCOTT, Police Officer for Ogden City Police Department; FNU MURRAY; TERRY L. THOMPSON, Sheriff for Weber County; KEVIN MCCLEOD, Undersheriff for Weber County Sheriff's Office; KEVIN BURTON, Captain and Corrections Division Chief Deputy for Weber County Correctional Facility; ROBERT WEST, Sgt. at Weber County Correctional Facility; ALTON JOHNSON, Sgt. at Weber County Correctional Facility; FNU GATES, Correctional Officer at Weber County Correctional Facility; ANDREW FLATT, Correctional Officer at Weber County Correctional Facility; JON GREINER, Chief of Police at Ogden City Police Department,

Respondents.

No. 15-602
(D.C. No. 1:11-CV-00128-DB-DBP)
(D. Utah)

ORDER

Before **BRISCOE**, Chief Judge, **LUCERO**, and **HOLMES**, Circuit Judges.

This matter comes on for consideration of the Petition for Permission to Appeal filed by David Webb. Upon consideration thereof, the petition is denied.

Mr. Webb seeks permission from this court to appeal an order of the district court granting summary judgment to some of the defendants, citing to 28 U.S.C. § 1292(b), § 1292(e), 42 U.S.C. § 1983, and Title VI of the Civil Rights Act of 1964 as grounds for jurisdiction. The caption of the petition also cites to Fed. R. App. P. 5. His argues in his petition that there is jurisdiction under the collateral order doctrine as set forth in *Cohen v. Beneficial Industrial Loan Corp., Bank*, 337 U.S. 541 (1949). None of these provide grounds for this court to hear this matter.

Section 1292(b) requires certification by the district court that the order at issue “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation” Here, the district court did not so certify the order nor did the plaintiff seek certification. The other jurisdictional statute cited by plaintiff, Section 1292(e), merely allows the Supreme Court to to prescribe rules to provide for interlocutory appeals not otherwise provided for in other subsections of § 1292.

Nor does As for Fed. R. App. P. 5 provide jurisdiction. Rule 5 states that:

(a)(1) To request permission to appeal when an appeal is within the court of appeals’ discretion, a party must file a petition for permission to appeal. The petition must be filed with the circuit clerk with proof of service on all other parties to the district-court action.

(2) The petition must be filed within the time specified by *the statute or rule authorizing the appeal*, or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

(Emphasis added.)

Thus, Rule 5 merely prescribes the procedure for taking an interlocutory appeal which is authorized by statute or other rule. Accordingly, reliance on Rule 5 is misplaced.

Mr. Webb argues that there is jurisdiction under the collateral order doctrine. In order to come within the collateral order doctrine, the order being appealed must meet three conditions. The order must “(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.” *Will v. Hallock*, 546 U.S. 345, 349 (2006) (internal quotations omitted). “[W]hen determining whether an order is ‘effectively unreviewable’ absent interlocutory review, ‘it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts.’” *Auraria Student Housing at the Regency, LLC v. Campus Village Apartments, LLC*, 703 F.3d 1147, 1150 (10th Cir. 2013) (quoting *Will v. Hallock*, 546 U.S. at 353). The order being appealed here does not meet that standard.

Accordingly, the petition for permission is **DENIED**.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

by: Ellen Rich Reiter
Jurisdictional Attorney